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No.

IN THE

Supreme Court of the United States

October Term, 1983

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK STATE TAX COMMISSION, RODERICK A. CHU, Commissioner of Taxation and Finance, FRANCIS R. KOENIG, Commissioner of the New York State Tax Commission, and MARK FRIEDLANDER, Commissioner of the New York State Tax Commission,

Petitioners,

against

AIR TRANSPORT ASSOCIATION OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the New York State Court of Appeals

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Dated: July 25, 1983

Question Presented.

Whether States are preempted by the provision of section 1113 of the Federal Aviation Act (49 USC § 1513) from imposing on corporations principally engaged in aviation a franchise tax that includes in the yardstick for measuring the amount of tax liability gross earnings from the sale of air transportation of persons and of both interstate and intrastate freight transportation.

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983.

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK STATE TAX COMMISSION, RODERICK A. CHU,* Commissioner of Taxation and Finance, FRANCIS R. KOENIG, Commissioner of the New York State Tax Commission, and MARK FRIEDLANDER, Commissioner of the New York State Tax Commission,

Petitioners,

against

AIR TRANSPORT ASSOCIATION OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the New York State Court of Appeals.

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the New York State Court of Appeals entered in this action on June 28, 1983. In addition, we request the case be argued together

*Roderick A. Chu succeeded James A. Tully, Jr., as Commissioner of Taxation and Finance.

with *Aloha Airlines, Inc. v. Director of Taxation, State of Hawaii* (No. 82-585) and *Hawaiian Airlines, Inc. v. Director of Taxation of the State of Hawaii* (No. 82-586).

Opinions Below.

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto at p A1. The opinion of the New York Supreme Court, Appellate Division, Third Department reported at 91 AD2d150, 458 N.Y.S.2d 602, and the opinions of the New York Supreme Court in Albany County, which are not reported, also appear in the Appendix hereto at pp A6-A11; A16-A22.

Jurisdiction.

The judgment of the New York State Court of Appeals was entered on June 28, 1983. This petition for certiorari is filed within 90 days from that date. This Court's jurisdiction is invoked under 28 USC § 1257(3).

Statutory Provisions Involved.

49 USC §1513, as amended by section 532 of the Airport and Airway Improvement Act of 1982,* (Pub L No. 97-248, 96 Stat 701) provides in pertinent part:

> "(a) No State * * * shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom * * * .

*This Act is Title V of the Tax Equity and Fiscal Responsibility Act of 1982.

"(b) Nothing in this section shall prohibit a State * * * from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services * * *."

Section 184 of the New York State Tax Law, as amended by chapter 486 of the New York Laws of 1981 provides in pertinent part:

"§ 184. Additional franchise tax on transportation and transmission corporations and associations.

"1. Every corporation, joint-stock company or association formed for or principally engaged in the conduct of aviation, surface railroad, whether or not operated by steam, subway railroad, elevated railroad, canal, steamboat, ferry (except a ferry company operating between any of the boroughs of the city of New York under a lease granted by the city), express, navigation, pipe line, transfer, baggage express, omnibus, trucking, taxicab, telegraph, telephone, palace car or sleeping car business, or formed for or principally engaged in the conduct of two or more of such businesses and every other corporation, joint-stock company or association formed for or principally engaged in the conduct of a transportation or transmission business not liable to taxation under section one hundred eighty-six of this chapter, for the privilege of exercising its corporate franchise, or of doing business, or of employing capital, or of owning or leasing property in this state in a corporate or

organized capacity or maintaining an office in this state, shall pay a franchise tax which shall be equal to three-quarters of one per centum upon its gross earnings from all sources within this state;

* * *

"4. Allocation of gross earnings from transportation and transmission services. —(a) Generally. A transportation or transmission corporation shall determine its gross earnings from transportation and transmission services within this state (except as otherwise provided for in this subdivision) by multiplying its gross earnings from transportation and transmission within and without the state by a fraction, the numerator of which is the taxpayer's mileage within this state and the denominator of which is the taxpayer's mileage within and without the state during the period covered by the report or reports required by this chapter.

"(b) Aviation corporations. An aviation corporation shall determine its gross earnings from transportation services within this state by multiplying its gross earnings from transportation services within and without this state by the arithmetical average of three ratios based on arrivals and departures, revenue tons handled and originating revenues during the period covered by the report or reports required by this chapter:

"(i) the ratio which the aircraft arrivals and departures within this state by any such corporation during the preceding calendar year bear to the total aircraft arrivals and departures within and

without this state during the same period; provided, however, arrivals and departures solely for maintenance or repair, refueling (where no debarkation or embarkation of traffic occurs), arrivals and departures of ferry and personnel training flights or arrivals and departures in the event of emergency situations shall not be included in such arrival and departure ratio; provided, further, the state tax commission may also exempt from such ratio aircraft arrivals and departures of all non-revenue flights including flights involving the transportation of officers or employees receiving air transportation to perform maintenance or repair services or where such officers or employees are transported in conjunction with an emergency situation or the investigation of an air disaster (other than on a scheduled flight); provided, however, that arrivals and departures of flights transporting officers and employees receiving air transportation for purposes other than specified above (without regard to remuneration) shall be included in computing such arrival and departure ratio;

"(ii) the ratio which the revenue tons handled by such corporation at airports within the state during the preceding calendar year bears to the total revenue tons handled by it at airports within and without this state during the same period; and

"(iii) the ratio which such corporation's originating revenue within this state for the preceding calendar year bears to its total originating revenue within and without this state for the same period. As used in this section the term

'aircraft arrivals and departures' means the number of landings and takeoffs of the aircraft of an aviation corporation, and the number of air pickups and deliveries by the aircraft of such corporation; the term 'originating revenue' means revenue to any such corporation from the transportation of revenue passengers and revenue property first received by such corporation either as originating or connecting traffic at airports and the term 'revenue tons handled' by any such corporation at an airport means the weight in tons, of revenue passengers (at two hundred pounds per passenger) and revenue cargo first received either as originating or connecting traffic or finally discharged by such corporation at such airport.

* * *

"(e) All other gross earnings, if any, shall be allocated to this state in the manner prescribed by rules and regulations promulgated by the tax commission.

"(f) With respect to other types of transportation and transmission corporations or where the tax commission decides that with respect to a certain corporation the method prescribed above does not fairly and equitably reflect gross earnings from all sources within this state, the tax commission shall prescribe methods of allocation or apportionment which fairly and equitably reflect gross earnings from all sources within this state. Also, the tax commission may, in order to properly reflect gross earnings, determine the report period in which any item of gross earnings shall be included without

regard to the method of accounting employed by a corporation taxable hereunder."

Statement of the Case.

Since 1935 the provisions of section 184 of the Tax Law have imposed a franchise tax measured by gross earnings on transportation and transmission corporations, including those principally engaged in aviation in New York. The tax originally excluded earnings derived from business of an interstate character. By chapter 486 of the Laws of 1981, the Legislature amended the section 184 franchise tax to include in the measurement of the tax gross earnings from all sources within New York. Gross earnings from sources within New York are determined by an allocation formula which was not challenged by the respondent. In 1973, Congress enacted section 1113 of the Federal Aviation Act, 49 USC §1513 ("section 1113") which prohibits States from imposing some taxes, but not franchise taxes, involving air commerce and air transportation.

The respondent, Air Transportation Association of America, is an unincorporated association which includes 21 corporations principally engaged in aviation in various States and New York and which are subject to the franchise tax imposed by section 184 of the New York Tax Law. Following the 1981 amendment of section 184 of the New York Tax Law, the respondent challenged the New York franchise tax in this proceeding as being violative of the Supremacy Clause of the United States Constitution. It asserts that section 184 violates the prohibitions of section 1113 of the Federal Aviation Act, stating that: (a) it imposes a tax on persons traveling in air commerce and on the air carriers' gross receipts derived therefrom; (b) it imposes a tax on the carriage of persons traveling in air commerce and on the air carriers' gross receipts derived

therefrom; and (c) it imposes a tax on the sale of air transportation and a tax on the air carriers' gross receipts derived therefrom.

On June 22, 1982, the New York Supreme Court in Albany County on reconsideration vacated its judgment dated May 1, 1982 and granted a judgment declaring:

> "that Subdivision 1 of Section 184 of the New York Tax Law, insofar as it imposes taxes on the gross receipts of air carriers derived from air carriage (other than on the gross receipts from freight services performed entirely in New York State), is unconsitutional by reason of Section 1113 of the Federal Aviation Act, 49 U.S.C. § 1513, and the Supremacy Clause of the United States Constitution."

The Appellate Division of the New York Supreme Court, Third Department, by decision of January 20, 1983 and an order dated January 27, 1983, affirmed the June 22, 1982 judgment. On June 28, 1983, the New York Court of Appeals affirmed the order of the Appellate Division for the reasons stated by Justice T. Paul Kane at the Appellate Division (see pp A8-A11 of Appendix). The courts below held that "the plain terms of section 1113 of the Federal Aviation Act strike directly at the subject tax, and do not allow for a construction which permits a tax either directly or indirectly on gross receipts derived from air transportation" (Appendix, p A10).

Reasons for Granting the Writ.

I.

The decision below conflicts with the decision of the Supreme Court of Hawaii in cases in which this Court has noted probable jurisdiction.

The court below, in holding that New York's franchise tax is preempted insofar as it applies to aviation corporations by section 1113 of the Federal Aviation Act, is in direct conflict with the decisions of the Hawaii Supreme Court in cases in which this Court has noted probable jurisdiction. *Aloha Airlines, Inc. v. Director of Taxation, State of Hawaii,* (No. 82-585) and *Hawaiian Airlines, Inc. v. Director of Taxation of the State of Hawaii* (No. 82-586). Those cases, in which New York has filed a brief *amicus*, are now awaiting argument. We request the Court to grant certiorari in this case and combine the argument with that in the Hawaii cases.

The decision below is not only in direct conflict with the cases arising from Hawaii, but it also brings an added dimension. The New York tax is a longstanding franchise tax on the privilege of doing business as a corporation. There is no dispute that the tax is indeed a franchise tax. The Hawaii tax has been treated as a property tax by the Hawaii courts, although its characterization as such is being challenged. Thus, this case clearly involves a tax specified in section 1113(b) of the Federal Aviation Act.

Moreover, this case presents an important and recurring issue. In addition to New York, Maryland imposes franchise taxes measured by gross receipts from air commerce which were in effect prior to the enactment of section 1113. Since 1920 Maryland has imposed a "franchise tax"

measured by gross receipts on all utilities and transportation companies. (Md Ann Code Art 81, § 130; chapter 226, 1929 Md Laws 621; see *Cumberland & P.R. Co. v. State*, 92 Md 668, 48 A2d 503, 507 [1901] [tax is franchise tax].) As far as we know, no airline has challenged the imposition of this tax in Maryland. And, of course, the interpretation of section 1113 of the Federal Aviation Act is of importance to many other States as this Court is aware from the *amici* briefs filed in the pending Hawaii cases. The New York franchise tax, as well as the taxes of other States measured by gross receipts on air commerce, represent a major revenue source.

II.

State franchise, property and net income taxes measured by gross receipts are not preempted by Section 1113 of the Federal Aviation Act.*

Simply reading subsections (a) and (b) of section 1113 of the Federal Aviation Act demonstrates a superficial ambiguity in the statute in that it permits States to levy property, franchise and income taxes while barring direct or indirect taxes on the gross receipts. However, the statute was not enacted in 1973 on a clean slate. It was written against a background of decisional law and state tax statutes, a background disregarded by the airlines and the Solicitor General in his *amicus curiae* brief in *Aloha Airlines, Inc. v. Director of Taxation, State of Hawaii* (No. 82-585) and *Hawaiian Airlines, Inc. v. Director of Taxation of the State of Hawaii* (No. 82-586). When the statute is examined in that historical context and its legislative history,

*Our reasons set forth here for believing that the court below erred in its interpretation of section 1113 of the Federal Aviation Act are essentially those discussed in our brief *amicus* in the cases arising from Hawaii.

the congressional intent becomes clear. As we will show, Congress did not intend to prohibit States from imposing franchise taxes measured by gross receipts on airlines and that conclusion is fully consistent with the statute's language, properly construed.

A. It had been well-settled when section 1113 of the Aviation Act was enacted in 1973 that including gross receipts as items that could be used as a measure for franchise and property taxes did not make them taxes on gross receipts.

At the time that section 1113 of the Federal Aviation Act was enacted in 1973, it was well established that States could use gross receipts as the *measure* of an otherwise constitutional tax, even though a tax imposed directly or indirectly on gross receipts might otherwise be invalid. See, Tribe, *Constitutional Law*, p 365.

Historically, franchise, as well as property, taxes based on gross receipts have been viewed as taxes on a local privilege or franchise or on property, the value of which is measured by receipts. Thus, such property taxes have been sustained. *Great Northern Railway Co. v. Minnesota*, 278 US 503 (1929). In *Pullman v. Richardson*, 261 US 330, 338, 339 (1923), the Court said:

> "[A] State may elect and employ any appropriate means of reaching its actual or full value as part of a going concern,—such as treating the gross receipts from its use in both intrastate and interstate commerce as an index or measure of its value,—and if the means do not involve any discrimination against interstate commerce and the tax amounts to no more than what would be legitimate as an ordinary tax upon the property,

> valued with reference to its use, the tax is not open to attack as restraining or burdening such commerce."

Similarly, gross receipts or gross earnings have simply constituted a "fair means of measuring a local privilege or franchise". *Western Livestock v. Bureau of Revenue*, 303 US 250, 256, 257 (1938); see, also, *Railway Express Agency v. Virginia*, 358 US 434, (1959). The cases also establish that a tax imposed on the privilege of exercising a corporate franchise measured by gross earnings, income or capital is neither a direct nor an indirect tax on gross earnings, income or capital of a corporation. It follows that a tax measured by gross income is not a direct or an indirect tax on gross income.

A tax on gross receipts has long been viewed as distinct from taxes measured by the gross earnings or receipts of a corporation and is also not an *indirect* tax on gross receipts included in the yardstick. See, e.g., *Werner Machine Co. v. Director of Taxation*, 350 US 492 (1956; *American Bank & Trust Co. v. Dallas County*, ____ US ____, 51 USLW 5181 (decided July 5, 1983). *Werner* involved the validity of a New Jersey franchise tax measured by a corporation's net worth. The taxpayer's net worth included obligations of the Federal government which are immune from state taxation under the provisions of 31 USC 742. The Federal statute provided at that time:

> "Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority."

This Court pointed out that this rule embraced "indirect taxation of such obligations through their inclusion in a tax imposed on all property of a taxpayer." But the Court in holding the franchise tax valid, said (350 US at p 494):

> "This Court has consistently upheld franchise taxes measured by a yardstick which includes tax-exempt income or property, even though a part of the economic impact of the tax may be said to bear indirectly upon such income or property. See, *e.g., Society for Savings v. Coite,* 6 Wall. 594; *Provident Institution v. Massachusetts,* 6 Wall. 611; *Hamilton Co. v. Massachusetts,* 6 Wall. 632; *Home Ins. Co. v. New York, supra; Educational Films Corp. v. Ward, supra; Pacific Co. v. Johnson, supra.* We have only recently adhered to this principle in another aspect of this field of taxation. See *Society for Savings v. Bowers, supra,* at 147-148. *New Jersey Realty Title Ins. Co. v. Division of Tax Appeals,* 338 U. S. 665, on which appellant relies, is distinguishable, in that it did not involve a franchise tax, but rather a tax whose legal incidence this Court found to be upon the intangible assets of the corporation.
>
> "Since as applied here this is a permissible tax on the corporate franchise, the decision below must be *Affirmed.*"

In *People v. Home Insurance Company.* 92 NY 328 (1883), affd 134 US 594 (1890), a franchise tax case, the measurement of the tax included interest on United States bonds and the amount invested in United States bonds was upheld. The New York court stated the issue as follows (*id.*, at 338-339):

> "It thus appears that the only question presented for our consideration under this branch of the appeal is whether the tax in question was in fact levied upon the franchises of the defendant, which would be undeniably lawful, or upon the property of the corporation invested in the securities of the general government, which would be unlawful. It is not claimed that the law in terms assumes to authorize the taxation of the exempted securities, but *it is asserted that it effects this result indirectly, and, therefore, amounts to the exercise of a prohibited power.*" (Emphasis supplied.)

In affirming the New York Court of Appeals, this Court in *Home Insurance Company v. New York,* 134 US 594, 600 (1890), said:

> "By the term 'corporate franchise or business,' as here used, we understand is meant (not referring to corporations sole, which are not usually created for commercial business) the right or privilege given by the State to two or more persons of being a corporation, that is, of doing business in a corporate capacity * * * The validity of the tax can in no way be dependent upon the mode which the State may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. *No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows* * * *" (Emphasis supplied.)

B. The legislative history of section 1113 of the Federal Aviation Act shows no intent to exclude States' franchise or property taxes using gross receipts as a measure from the taxes expressly permitted under section 1113.

Contrary to the decisions below, there is absolutely no basis for a conclusion that franchise, property and net income taxes were not within the taxes expressly protected by section 1113(b) of the Federal Aviation Act. As discussed above, it had long been held that using gross receipts as a measure for taxes did not mean such a tax was a tax on gross receipts, either directly or indirectly. Nothing in the Aviation Act's legislative history shows that Congress intended to ignore such interpretations. Accordingly, the restriction on direct or indirect taxes on gross receipts in section 1113(a) is simply not applicable to franchise, property or net income taxes.

1. An intent to preempt state taxes must be clearly shown by Congress.

When Congress speaks to proscribe the incidents on which state taxes may be imposed, it does so clearly and precisely. See, for example, the discussion in the annotation of 12 USCA 548, state taxation of national banks prior to 1973. It has long been recognized that "historic * * * powers of the States [are] not to be superseded" by Federal law, "unless that was the clear and manifest purpose of Congress". *Rice v. Santa Fee Elevator Corp.*, 331 US 218, 230 (1974); accord, e.g., *Ray v. Atlantic Richfield Co.*, 435 US 151, 157 (1978).

The complete absence of any reference in the Congressional history of section 1113 of the Federal Aviation Act, as we discuss below, to broad-based corporate franchise,

property or net income, such as the tax which was then being imposed by the State of New York, supports the view that Congress had not the remotest intent of including them within the state tax proscription Congress set up in subsection (a) of the Federal Act. To the contrary, Congress, in subsection (b), carefully preserved state franchise, property and income taxes. Congress, in the past, has spoken with clarity when it desired to proscribe a particular type of taxation. These are the very considerations discussed by this Court in *Sullivan v. United States,* 395 US 169 (1969). There the issue before the Court was whether Connecticut's sales and compensating use taxes were prohibited on sales to or uses by servicemen as a result of section 514 of the Soldiers' and Sailors' Civil Relief Act. This Court held that Congress never intended to bar state sales and use taxes (395 US at 178). Here, if Congress wished to prohibit taxes other than those "on the gross receipts" from the sale of air transportation, it could have said so clearly as it has done with other prohibitions of state taxes. Instead, it expressly protected property taxes, net income taxes, franchise taxes and sales or use taxes on the sale of goods or services without restriction.

It is clear, we submit, that Congress did not intend to preempt state taxes measured by gross receipts by subsection (a) of section 1113 of the Federal Aviation Act. In addition, the entire statute demonstrates that Congress reaffirmed the rights of States to have airlines pay for the privileges, protection and services which they and their property received from the states.

2. *The legislative history of section 1113 of the Federal Aviation Act shows no intent to preempt States from applying broad-based franchise and property taxes to airlines.*

Section 1113 of the Federal Aviation Act was enacted in response to the *Evansville-Vanderburgh Airport* case, 405 US 707, 721, 722 (1972). In that case, this Court upheld the validity of a city-imposed "use and service charge" of $1.00 on each enplaning commercial passenger at Evansville, Indiana, which was collected from the passenger, and a New Hampshire state law levying a $1.00 charge on the airline for each passenger on large commercial airlines, and 50 cents for each passenger on smaller planes. The Court ruled that States and cities could constitutionally impose a reasonable charge on interstate and intrastate air passengers where no Federal statute or specific congressional action evidenced a purpose to preempt state power.

The statements by the prime sponsors* when the bills were introduced, statements in the committee reports, and statements by managers and others on the floor of both

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*Though the Act was not enacted until 1973, an earlier version was passed by both Houses of Congress in 1972, but was pocket vetoed by President Nixon. See, 118 Cong Rec 35862 (Oct. 13, 1972) (Senate passage of Conference Report); *id.* at 35116 (Oct. 11, 1972) (House passage); *id.* at 37203 (announcement of pocket veto).

Senator Magnuson was one of the two prime sponsors in the Senate, see *id.* at 22598. Representative Adams sponsored legislation in the House and conducted most of the hearings on the various proposals. See, hearings on HR 2337, 14847, and 10326 (and identical bills) before the Subcommittee on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 92nd Cong, 1st Sess (1972).

The relevant legislative history of the Act spans two sessions of Congress.

houses confirmed that the prime impetus for the prohibitory language was to ban the proliferating head taxes and similar taxes directed against airlines.* This is further borne out by the 1982 amendment to the law, section 532 of the Airport and Aviation Improvement Act of 1982. At the same time, Congress intended to reconfirm to the States major sources of revenue.**

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*The Senate Commerce Committee stated in its report on the bill:

> "S.38 contains a prohibition on state taxation of passengers or on the carriage of passengers in air transportation. This prohibition will potentially deprive airport operators from a new and attractive source of revenue with which to support their airports—namely the passenger head tax."

S. Rep. 12, 93rd Cong., 1st sess. 11-12 (1973).

See, e.g., H. Rep. 1279, 92nd Cong., 2d sess. 2, 4 (1972); S. Rep. 1005, 92nd Cong., 2d sess. 20-25 (1972); S. Rep. 12, 93rd Cong., 1st sess. 4, 12, 17 (1973), H. Rep. 157, 93rd Cong., 1st sess. 2-3, 10 (1973); 118 Cong. Rec. 22599 (June 27, 1972) (remarks of Sen. Cannon), *id.* at 27815 (Aug. 10, 1972) (remarks of Sen. Cannon), *id.* at 27816 (remarks of Sen. Cotton), *id.* at 27826-27 (remarks of Sen. Hartke), *id.* at 27828 (remarks of Sen. Spong), *id.* at 29153 (Aug. 15, 1972) (remarks of Rep. Staggers); 119 Cong. Rec. 214 (Jan. 4, 1973) (remarks of Sen. Cannon), *id.*, at 3928 (Feb. 8, 1973) (remarks of Rep. Adams), *id.* at 13898 (May 2, 1973) (remarks of Rep. Staggers), *id.* at 13899 (remarks of Rep. Kuykendell), *id.* at 13900 (remarks of Rep. Jarman), *id.* at 13905 (remarks of Rep. Adams).

**The senior staff counsel for the Ways and Means Oversight Subcommittee of the United States House of Representatives wrote:

> "The approach taken by the Airport Development Acceleration Act broadly restricts states from imposing taxes or 'other charges' with respect to air commerce, but exempts from this broad restriction certain types of taxes such as property, income, franchise, and sales or use taxes. The exempted taxes are, of course, the major revenue sources for states and, accordingly, the Act effectively balances national interests and those of the states' revenue needs with respect to air commerce."

PARNELL, *Constitutional Considerations of Federal Control Over the Sovereign Taxing Authority of the States*, 28 Cath UL Rev 227, 246 (1979).

The clearest congressional statement of the intent and scope of section 1113 of the Federal Aviation Act is found in Senate Report 12, 93rd Congress. In its discussion of the state tax prohibition, the Report states:

> "[The bill prohibits] a new, inequitable and potentially chaotic burden of taxation on the nearly 200 million persons who use air transportation each year. The legislation prohibits the levying of state or local head taxes, fees or charges either on passengers or on the carriage of such passengers in interstate commerce. The provision is in response to a situation which has been brought about by an April 19, 1972 Supreme Court decision in *Evansville-Vanderburg Airport Authority District, et al. v. Delta Airlines, Inc., et al.*, upholding passenger head taxes enacted by New Hampshire and by Evansville, Indiana, for 'aviation-related purposes'. While this decision has invited state and local governments to enact head taxes or fees on air travelers, the Court decision does not provide adquate [*sic*] safeguards to prevent undue or discriminatory taxation." (US Code Congressional and Admin News, 93rd Cong, 1st Session, Vol 1, p 1446.)

Throughout the report, the type of tax primarily discussed is a passenger head tax, whether paid directly by the passenger or absorbed by the carrier.* The tax is described in the report as a flat rate on passengers, regardless of the distance traveled by the passenger.

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*Taxes paid primarily by persons who can shift the burden someone else or who are under no legal compulsion to pay them are considered indirect taxes. Taxes on the ultimate consumer whose payment cannot be avoided are direct taxes. See 71 Am Jur 2d, State and Local Taxation, § 19.

In regard to subsection (b) of section 1113, which makes clear other state taxes are not prohibited, the Conference Report states:

> "The Senate bill also provided that *the prohibition would not extend to* the levy or collection of *other taxes, such as property taxes,* net income taxes, *franchise taxes,* and sales taxes, and sales or use taxes, nor to the levy or collection of other charges such as reasonable rental charges, landing fees, and other services charges from aircraft operators for the use of airport facilities." (Conference Report No. 930225, found in US Code Congressional and Admin News, 93rd Cong, 1st Session Vol 1, p 1458.) (Emphasis supplied.)

If Congress had intended to prohibit franchise taxes which are measured by gross receipts from the sale of air transportation that part of subsection (b) permitting franchise taxes would be a mere surplusage and meaningless. There is no language other than that contained in section 1113(a) which conceivably could be construed as preempting States from imposing franchise taxes measured by gross receipts. That being so, section 1113(b) would have no meaning if it were construed, as the courts below and the airlines would have it, as protecting franchise taxes not measured in some way by gross receipts. It is clear that even a franchise tax measured by net income would literally be a direct or indirect tax on gross receipts. Indeed, section 1113(b) treats income taxes and franchise taxes the same way in recognition that neither type of tax was intended to be preempted.

The legislative history of the Federal Act found in the Subcommittee Hearings and Reports is replete with discussions of the limited scope of the state tax prohibition intended by Congress (Subcommittee on Transportation and

Aeronautics of the Committee on Interstate and Foreign Commerce, House of Representatives, Ninety-Second Congress, 2nd Session, on HR 2337, HR 14847 and HR 10326, Serial No. 92-74 [hereinafter referred to as "Subcommittee hearings, Ninety-Second Congress"] and Ninety-Third Congress, 1st Session, on HR 4082, *et al.*, Serial No. 93-6 [hereinafter referred to as "Subcommittee hearings, Ninety-Third Congress"]).

In the hearings there is limited discussion of a unique Ohio Airlines excise tax. The concern of the Subcommittee and of the industry witnesses was the proliferation of discriminatory, selective state taxes in the form of the *Evansville* type of taxation or the Ohio Airlines excise tax.

The Ohio excise tax on airlines read as follows:

> "Section 5745.02. *Tax imposed on transporting by air.*—For the purpose of providing revenue for the use of the general revenue fund of the state * * * an excise tax is hereby imposed upon the privilege of engaging in the business of transporting persons, or property by air within this state." (Emphasis supplied.)

The measure of the Ohio tax was four (4) percent of the receipts derived from or attributable to business carried on within Ohio.

Theodore Koetz, then Ohio Deputy Tax Commissioner, testified before the Congressional subcommittee on considering the Federal Aviation Act stated:

> "We have an airlines excise tax in Ohio which is unique, and we are probably the only state in the 50

states that has such a tax. (p. 246 of Subcommittee Hearings, Ninety-Third Congress).

"The Ohio tax structure may be unique in reference to airlines. Most businesses in Ohio, be they domestic or foreign, intrastate or multistate, are amenable to a *franchise tax* and a personal property tax * * * However, the airlines are fully subject only to the corporate franchise tax. [And a less burdensome property tax and the airlines excise tax.]" (Emphasis supplied, p 247.)

The Ohio Supreme Court when examining the Ohio airlines excise tax had clearly distinguished the Ohio franchise tax (which as applied to airlines may include receipts from the sale of air transportation in the calculation of its base) from the Ohio Airlines excess tax as follows in *United Airlines v. Portersfield,* 276 NE2d 629, 635 (1971), app dsmd 401 US 917 (1972):

"R.C. 5733.01, Ohio's corporation franchise tax statute, provides, in pertinent part:

'* * * the tax * * * for foreign corporations shall be [1] for the privilege of doing business in this state, [2] owning or using a part or all of its capital or property in this state, or [3] holding a certificate of compliance with the laws of this state authorizing it to do business in this state during the calendar year in which such fee is payable.'

"United is subject to the tax provided for by that statute, measured, in part, by the amount of the receipts from airline passenger tickets issued in Ohio for both intrastate and interstate flights. See *American Airlines v. Porterfield* (1970), 21 Ohio St. 2d 272.

> "We mention the franchise tax to clearly reveal that we are mindful that *the tax in issue in the instant case is not another franchise tax on the right to do business in Ohio* in the corporate form of organization, and that the airline tax is not levied in lieu of other state taxes." (Emphasis supplied.)

Mr. Tipton, the Chairman of the Air Transporation Association of America, Inc., described the Ohio tax in his testimony at the Transportation and Aeronautics Subcommittee Hearings on section 1113 (Ninety-third Congress, First Session) at page 98, as follows:

> "Particularly dangerous, burdensome, and discriminatory in our judgment is one state's imposition of a tax on the gross receipts derived from *the sale of interstate air transportation—a so-called airlines excise tax.* This tax is levied at a rate of 4 percent on airline receipts in that state 'for the privilege of engaging in the business of transporting persons or property by air.' "

He did not voice any objection to taxes measured by gross receipts. The state tax prohibition of subsection [a] initially considered by the Ninety-Second Congress contained the prohibition of a state or local tax on: [1] "persons traveling in air commerce" and [2] "the carriage of persons in air transportation" (HR 14847, p 2, lines 18-22; HR 2337; p 1, lines 6-9). The legislative history indicates that the language "on the sale of air transportation or on the gross receipts derived therefrom" added to the final text of section 1113 was directed specifically at Ohio's airlines excise tax. With the addition of this language,

subsection (b) was added to assure and reaffirm state taxing power. It circumscribed the taxes prohibited by subsection (a), specifically describing certain taxes, including franchise taxes, that were not preempted.*

Interestingly, one of the sponsors of Senate Bill 3755, 92nd Cong, which included section 1113 of the Federal Aviation Act as enacted, was Senator Magnuson from the State of Washington. Representative Adams, also from the State of Washington, sponsored the legislation in the House. It is doubtful that they intended to preempt Washington's nondiscriminatory tax on airlines and other utilities and carriers.**

It is also significant that Congress has been mindful of the long-established difference between taxes and their measurement. Thus, when it amended 31 USC § 742 in 1959, which prohibits state taxes on Federal obligations, it not only preserved non-discriminatory franchise taxes but, unlike the present statute, also overcame the measurement distinction for certain other taxes by extending the exemption to situations where certain Federal obligations were used in the *computation* of the tax. *American Bank &*

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*In November, 1973, the State of Ohio, *sua sponte*, in an opinion by its Attorney General, declared that Ohio's airline excise tax "must be discontinued because it conflicts with section 1113 of the Federal Aviation Act." The opinion is not expansive and did not elaborate on the reasoning which led to the legal conclusion. It is, however, consistent with both the language and history of the Aviation Act, as we have discussed.

**The Committee on Transportation and Aeronautics included Congressman Bertram L. Podell of New York. The Committee on Interstate and Foreign Commerce included Congressmen Bertram L. Podell, James F. Hastings and Norman F. Lent of New York and Goodloe E. Byron of Maryland. These Committees held the hearings on section 1113 of the Federal Aviation Act.

Trust Co. v. Dallas County, supra, ____ US ____, 51 USLW 5181, 5183-5184 (1983). That section now provides:

> "Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority. *This exemption extends to every form of taxation* that would require *that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax,* except nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes." (Emphasis supplied.)

The purpose behind that amendment is stated in the Bill's legislative history, 59 US Code Cong & Admin News, pp 2773-2774, as follows:

> "D. CLARIFYING EXEMPTION OF U.S. OBLIGATIONS FROM STATE OR LOCAL TAXATION
>
> "Present law provides that obligations of the United States are to be exempt from taxation by or under State or local authority. The Supreme Court has held that this includes the exemption of interest on U. S. obligations from taxation by or under State or local authority. It has been pointed out to your committee, however, that one State has taken the position that the statute as now worded does not prohibit a State from including interest on Federal obligations in computing 'gross income' upon which taxable net income is determined. The

> bill (sec. 105) makes it clear that the exemption for Federal obligations extends to every form of taxation that would require either the obligation, or the interest on it, or both to be considered directly or indirectly in the computation of the tax, *except nondiscriminatory franchise taxes* (or other nondiscriminatory nonproperty taxes imposed in lieu thereof) on corporations and except estate or inheritance taxes." (Emphasis supplied.)

The present statute again preserves franchise, property and net income taxes. We submit that Congress expressly intended to exempt these three types of taxes, even though gross receipts are used as a measure.

CONCLUSION.

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Court of Appeals of the State of New York and this case should be argued with *Aloha Airlines, Inc. v. Director of Taxation, State of Hawaii* (No. 82-585) and *Hawaiian Airlines, Inc. v. Director of Taxation of the State of Hawaii* (No. 82-586).

Dated: Albany, New York
July 25, 1983

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Petitioners

PETER H. SCHIFF
Acting Attorney in Chief
Appeals and Opinions

FRANCIS V. DOW
Assistant Attorney General
of Counsel

APPENDIX

APPENDIX.

Decision of the Court of Appeals, Dated June 28, 1983.

No. 326

AIR TRANSPORT ASSOCIATION OF AMERICA,

Respondent,

v.

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, *et al.*,

Appellants.

Order affirmed, with costs, for reasons stated in the opinion by Justice T. Paul Kane at the Appellate Division (91 AD 2d 169).

Chief Judge Cooke and Judges Jasen, Jones, Wachtler, Meyer and Simons concur.

Remittitur.

COURT OF APPEALS,

STATE OF NEW YORK.

The Honorable Lawrence H. Cooke, Chief Judge, Presiding.

No. 326

AIR TRANSPORT ASSOCIATION OF AMERICA,

Respondent,

v.

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, *et al.*,

Appellants.

The appellants in the above entitled appeal appeared by Hon. Robert Abrams, Attorney General; the respondent appeared by Debevoise & Plimpton, Esqs.

The Court, after due deliberation, orders and adjudges that the order is affirmed, with costs, for reasons stated in the opinion by Justice T. Paul Kane at the Appellate Division (91 AD2d 169). Chief Judge Cooke and Judges Jasen, Jones, Wachtler, Meyer and Simons concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, Albany County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

Court of Appeals, Clerk's Office, Albany, June 28, 1983.

JOSEPH W. BELLACOSA
Clerk of the Court

Order, Dated January 27, 1983.

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, at the Justice Building in the City of Albany, New York, commencing on the 13th day of December, 1982.

Present:

Hon. T. Paul Kane,
Justice Presiding,
Hon. Ann T. Mikoll,
Hon. Paul J. Yesawich, Jr.,
Hon. Leonard A. Weiss,
Hon. Howard A. Levine,
Associate Justices.

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—THIRD DEPARTMENT

AIR TRANSPORT ASSOCIATION OF AMERICA,

Plaintiff-Respondent,

v.

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK STATE TAX COMMISSION, JAMES H. TULLY, Jr., Commissioner of Taxation and Finance, FRANCIS R. KOENIG, Commissioner of the

New York State Tax Commission, and MARK FRIEDLANDER, Commissioner of the New York State Tax Commission,

Defendants-Appellants.

#43719
Albany County Clerk's Index No. 11450-81

Appellants New York State Department of Taxation and Finance, New York State Tax Commission, James H. Tully, Jr., Commissioner of Taxation and Finance, Francis R. Koenig, Commissioner of the New York State Tax Commission, and Mark Friedlander, Commissioner of the New York State Tax Commission, having appealed from a judgment of Albany County Supreme Court, Special Term, entered on the 22nd day of June, 1982, in the office of the Clerk of the County of Albany, and said appeal having been presented during the above-stated term of this Court, and having been argued by Francis V. Dow, Esq., of counsel for appellants, and by Andrew C. Hartzell, Jr., Esq., of counsel for respondent, and, after due deliberation, the Court having rendered a decision on the 20th day of January, 1983, it is hereby

ORDERED that the judgment appealed from be affirmed, without costs.

Dated and Entered: January 27, 1983.

JOHN J. O'BRIEN
Clerk

A True Copy
JOHN J. O'BRIEN
Clerk

Opinion of the Appellate Division, Third Department, Dated January 20, 1983.

January 20, 1983 43719

AIR TRANSPORT ASSOCIATION OF AMERICA,

Respondent,

v.

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, *et al.*,

Appellants.

Judgment affirmed, without costs.
Opinion per Kane, J. P.
Mikoll, Yesawich, Jr., Weiss and Levine, JJ., concur.

Opinion of the Appellate Division, Third Department.

STATE OF NEW YORK, SUPREME COURT,

APPELLATE DIVISION—THIRD DEPARTMENT.

AIR TRANSPORT ASSOCIATION OF AMERICA,

Respondent,

against

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE *et al.*,

Appellants.

#43719

Argued, December 14, 1982.

Before:

Hon. T. Paul Kane,
Justice Presiding,
Hon. Ann T. Mikoll,
Hon. Paul J. Yesawich, Jr.,
Hon. Leonard A. Weiss,
Hon. Howard A. Levine,
Associate Justices.

Appeal from a judgment of the Supreme Court at Special Term (DeForest C. Pitt, J.), entered June 22, 1982 in Albany County, which, *inter alia,* granted plaintiff's motion for reargument, and, upon reargument, declared section 184 (subd. 1) of the New York State Tax Law to be unconstitutional.

Robert Abrams, Attorney-General (Francis V. Dow of counsel), for appellants, The Capitol, Albany, New York, 12224.

Debevoise & Plimpton (Andrew C. Hartzell of counsel), for respondent, 299 Park Avenue, New York, New York 10171.

Opinion for Affirmance.

KANE, J. P.

Plaintiff is an unincorporated trade and service association consisting of 31 air carriers, 21 of whom do business in New York State. In this declaratory judgment action, plaintiff contends that section 184 (subd. 1) of the New York State Tax Law imposes a tax that is prohibited by section 1113 of the Federal Aviation Act (U. S. Code, tit. 49, § 1513) and is, therefore, unconstitutional under the supremacy clause (art. VI, cl. 2) of the United States Constitution.

Section 1113 of the Federal Aviation Act provides, in pertinent part, that:

(a) No State * * * shall levy or collect a tax, fee, head charge, or other charge, *directly or indirectly,* on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or *on the gross receipts derived therefrom* * * * (emphasis added).

(b) Nothing in this section shall prohibit a State * * * from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services * * *.

Section 184 (subd. 1) of the Tax Law provides, *inter alia,* that:

> Every corporation * * * formed for or principally engaged in the conduct of aviation * * * for the privilege of exercising its corporate franchise, or of doing business, or of employing capital, or of owning or leasing property in this state in a corporate or organized capacity, or maintaining an office in this state, *shall pay a franchise tax which shall be equal to three-quarters of one per centum upon its gross earnings from all sources within this state* (emphasis added).

Special Term found that section 184 (subd. 1) of the Tax Law, while called an "additional franchise tax", was *inter alia,* "in fact a tax upon the gross receipts from sale of air transport services" and that section 1113 of the Federal Aviation Act forbids such a tax. This being the case, Special Term declared section 184 (subd. 1) of the Tax Law unconstitutional. This appeal ensued.

Defendants' central argument is that the gross earnings of section 184 (subd. 1) are not entirely composed of gross receipts from the sale of air coverage, but have other components. As such, defendants assert that the franchise tax in question, which includes gross receipts in its measurement, is permissible and, therefore, not in conflict with section 1113 since subdivision (b) of that section explicitly permits the levy of franchise taxes.

This argument must be rejected. In our opinion, the plain terms of section 1113 of the Federal Aviation Act strike directly at the subject tax, and do not allow for a construction which permits a tax either directly or indirectly on gross receipts derived from air transportation. Moreover, legislative history, evidenced by the various forms of the bills and hearing testimony, supports our reading of section 1113 of the Federal Aviation Act. In particular, Congress refused to adopt a suggestion by the State of Ohio to add language to subdivision (b) of section 1113 which would have permitted State taxation of fairly apportioned air carrier gross receipts (see Hearings Before the Subcommittee on Transportation and Aeronautics, House Committee on Interstate and Foreign Commerce, 93rd Congress, First Session).

In November, 1973, the Ohio Attorney-General issued an opinion declaring the Ohio excise tax discussed above to be in conflict with section 1113, as that section "prohibits both direct and indirect state taxation of the sale of air transportation" (Ohio Attorney-General Opn. No. 73-117). We would also note that the Court of Appeals of Arizona has held that a transaction privilege levy imposed by Arizona on air carriage measured by gross receipts of sales was impermissible as it conflicted with, and was thus preempted by, section 1113 (*State ex rel. Arizona Dept. of Revenue v. Cochise Airlines*, 626 P 2d 596 [Ariz.]).

Defendants argue that the New York franchise tax challenged herein is distinguishable from both the Ohio tax and Arizona tax. We, however, are unable to find any meaningful distinction. The language of section 184 (subd. 1) also refers to "privilege", and defendants' argument that the measurement of the challenged tax by gross earnings is distinguishable from a direct tax on gross receipts is without substance. In this regard, the fact that section 184 (subd. 1) of the Tax Law imposes a tax on other categories of income does not alter the fact that it imposes a tax upon the gross receipts derived from air carriage.* Finally, defendants' contention that to construe the Federal statute as prohibiting the use of gross receipts in determining franchise taxes would render meaningless the explicit provision in section 1113 (sub. [b]) permitting the levy of franchise taxes by States is specious, since the measurement for the franchise tax could be structured in a different way (but see *Matter of Aloha Airlines, Inc.*, 647 P 2d 263 [Hawaii], U.S. S. Ct. app. pending).

We would, therefore, agree with Special Term that section 184 (subd. 1) of the Tax Law is preempted by the subject Federal statute insofar as gross earnings are measured by gross receipts from air carriage. Special Term's judgment must, therefore, be affirmed.

The judgment should be affirmed.

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*Plaintiff does not challenge the tax on other categories of income.

Judgment of Pitt, J., Dated June 22, 1982.

At a Special Term, Part I, of the Supreme Court of the State of New York, County of Albany, held at the Albany County Courthouse, Albany, on the 3rd day of June, 1982.

Present:

Honorable DeForest C. Pitt, Justice.

AIR TRANSPORT ASSOCIATION OF AMERICA,

Plaintiff,

against

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK STATE TAX COMMISSION, JAMES H. TULLY, Jr., Commissioner of Taxation and Finance, FRANCIS R. KOENIG, Commissioner of the New York State Tax Commission, and MARK FRIEDLANDER, Commissioner of the New York State Tax Commission,

Defendants.

Index No. 11450-81

Plaintiff having moved the Court by notice of motion dated February 12, 1982, for summary judgment pursuant to Rule 3212 of the Civil Practice Law and Rules; plaintiff's motion for summary judgment having come on to be heard on March 26, 1982; the Court having rendered a decision dated April 15, 1982, denying plaintiff's motion for summary judgment and granting summary judgment in favor of defendants; the Court having entered a Judgment dated May 1, 1982, granting summary judgment in favor of defendants; plaintiff having moved this Court by notice of motion dated May 14, 1982, for reconsideration of the Court's decision; plaintiff's motion for reconsideration having come on to be heard on June 3, 1982; and this Court having rendered a decision dated June 10, 1982, granting plaintiff's motion for reconsideration and its motion for summary judgment, a copy of which is annexed hereto.

NOW, upon the complaint dated December 2, 1981; the answer dated December 30, 1981; plaintiff's notice of motion for summary judgment dated February 12, 1982; the Affidavit of Robert Glasser sworn to February 8, 1982; plaintiff's memorandum in support of its motion for summary judgment dated February 12, 1982, and the appendices annexed thereto; the Affidavit of Paul B. Coburn in opposition to plaintiff's motion for summary judgment sworn to March 12, 1982; defendants' memorandum in opposition to plaintiff's motion for summary judgment dated March 12, 1982; plaintiff's reply memorandum in support of its motion for summary judgment dated March 25, 1982, and the appendix annexed thereto; the arguments by counsel for the parties on March 26, 1982; defendants' memorandum dated April 8, 1982, and the exhibits annexed thereto, responding to plaintiff's reply memorandum; plaintiff's notice of motion for reconsideration dated May 14, 1982; plaintiff's memorandum in

support of its motion for reconsideration dated May 14, 1982, and the appendices annexed thereto; defendants' letter in response to plaintiff's motion for reconsideration dated June 1, 1982; and the arguments by counsel for the parties on June 3, 1982; and after due deliberation thereon; it is hereby

ORDERED that plaintiff's motion for reconsideration is granted; and it is

FURTHER ORDERED that the Court's Judgment dated May 1, 1982, is vacated; and it is

FURTHER ORDERED, ADJUDGED and DECREED that plaintiff's motion for summary judgment pursuant to Rule 3212 of the Civil Practice Law and Rules is granted; and it is

FURTHER ORDERED, ADJUDGED and DECREED that Subdivision 1 of Section 184 of the New York Tax Law, insofar as it imposes taxes on the gross receipts of air carriers derived from air carriage (other than on the gross receipts from freight services performed entirely in New York State), is unconstitutional by reason of Section 1113 of the Federal Aviation Act, 49 U.S.C. § 1513, and the Supremacy Clause of the United States Constitution; and it is

FURTHER ORDERED, ADJUDGED and DECREED that defendants and all persons in active concert and participation with them are permanently enjoined from assessing, determining, imposing or collecting from plaintiff's members any tax pursuant to Subdivision 1 of Section 184 of the New York Tax Law on the gross receipts derived from air carriage (other than on the gross receipts from

freight services performed entirely in New York State); and it is

FURTHER ORDERED that plaintiff is entitled to recover its costs herein incurred.

Dated: Albany, New York
June 22, 1982

Enter:

S/ DEFOREST C. PITT
J.S.C.

Memorandum Opinion of Pitt, J., Dated June 10, 1982.

STATE OF NEW YORK, SUPREME COURT,

COUNTY OF ALBANY.

AIR TRANSPORT ASSOCIATION OF AMERICA,

Plaintiff,

against

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK STATE TAX COMMISSION, JAMES H. TULLY, Jr., Commissioner of Taxation and Finance, FRANCIS R. KOENIG, Commissioner of the New York State Tax Commission, and MARK FRIEDLANDER, Commissioner of the New York State Tax Commission,

Defendants.

(Supreme Court, Albany County Special Term, June 3, 1982.)
(Hon. DeForest C. Pitt, Presiding)
(No. 158)

Appearances:

Debevoise & Plimpton, Esqs., Attorneys for Plaintiff. (Andrew C. Hartzell, Jr., Philip S. Winterer & Steven Klugman, Esqs., of Counsel.)

Robert Abrams, Attorney General, State of New York, Attorney for Defendants. (Lawrence L. Doolittle, Asst. Atty. Gen., of Counsel.)

PITT, J.

The plaintiff, the Air Transport Association of America, has moved for reargument of the decision and order of this Court which found application of section 184 of the New York Tax Law constitutional and not within the prohibition of section 1113 of the Federal Aviation Act.

This Court found that section 184 of the Tax Law was in fact a tax upon the gross receipts from the sale of air transport services. The Court looked to the legislative history to determine that such tax was not barred by the Federal Aviation Act because the tax was not in any way discriminatory. Upon reargument the plaintiff has shown that the Court misinterpreted section 1113 of the Federal Aviation Act. In its original decision the Court held that if sales taxes were allowed on the sale of air transportation then certainly franchise taxes would be allowed. The Court then looked at the problems which section 1113 of the Federal Aviation Act addressed and determined that since section 184 of the Tax Law was not discriminatory that it would not be barred by said section.

The legislative drafting history of section 1113 of the Federal Aviation Act clearly shows that Congress did not intend to allow sales taxes on the sale of air transportation. Furthermore, such drafting history shows that the language of subdivision b of section 1113, which states "nothing herein shall prohibit a state . . . from the levy or collection of taxes *other than those enumerated in subsection (a) of this section,*" (emphasis added) was intended to bar any type of tax based upon the gross receipts derived from the sale of air transportation.

Since this Court mistakenly implied a requirement that taxes be discriminatory to be barred by section 1113 of the Federal Aviation Act and since it is now determined from the legislative history that said section imposes an absolute bar on any taxes upon gross receipts from the sale of air transportation, it is the determination of this Court that section 184 of the New York State Tax Law is in violation of such prohibition and is unconstitutional pursuant to the supremacy clause of the United States Constitution.

The plaintiff's motions for reargument and for summary judgment declaring that subdivision (1) of section 184 of the New York State Tax Law unconstitutional are therefore granted in all respects.

Submit order.

Dated: Troy, N. Y.
June 10, 1982.

(All papers to the Attorneys for Plaintiff.)

Memorandum Opinion of Pitt, J., Dated April 15, 1982.

STATE OF NEW YORK, SUPREME COURT,

COUNTY OF ALBANY.

AIR TRANSPORT ASSOCIATION OF AMERICA,

Plaintiff,

against

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK STATE TAX COMMISSION, JAMES H. TULLY, Jr., Commissioner of Taxation and Finance, FRANCIS R. KOENIG, Commissioner of the New York State Tax Commission, and MARY FRIEDLANDER, Commissioner of the New York State Tax Commission,

Defendants.

(Supreme Court, Albany County Special Term, March 26, 1982.)
(Hon. DeForest C. Pitt, Presiding)
(No. 13)

Appearances:

Debevoise and Plimpton, Esqs., Attorneys for Plaintiff. (Andrew C. Hartzell, Jr.; Philip S. Winterer and Stephen Klugman, Esqs., of counsel.)

Robert Abrams, Attorney General, State of New York, Attorney for Defendants. (Lawrence L. Doolittle, Asst. Atty. Gen. of counsel.)

PITT, J.

Memorandum

The plaintiff, The Air Transport Association of America, an unincoporated trade and service association consisting of 31 air carriers, has moved for summary judgment declaring subdivision 1 of section 184 of the New York Tax Law unconstitutional insofar as it seeks to tax the gross receipts of plaintiff's member air carriers.

The defendants have raised the issue of whether the plaintiff association has standing to challenge section 184 of the Tax Law because it does not pay any taxes pursuant to said section. However, the complaint alleges that the association members are subject to the tax and have paid such tax and that such taxes amount to millions of dollars each year. These allegations are sufficient to give the plaintiff standing to sue, (*Boston Stock Exchange v. State Tax Com.* 429 U.S. 318.)

The complaint alleges that subdivision 1 of section 184 of the Tax Law violates the supremacy clause of the United States Constitution because said section of the Tax Law imposes a tax upon the gross receipts from the sale of air transport services in violation of section 1113 of the Federal Aviation Act, (49 U.S.C. section 1513.) This section of the Federal Aviation Act prohibits the states from levying or collecting taxes based upon the gross receipts derived from the sale of air transportation. Subdivision 1 of section 184 of the New York State Tax Law taxes every corporation engaged in aviation three quarters of one percent of its gross earnings from all sources within the State. Said subdivision calls the tax a "franchise tax".

The defendants contend that the tax challenged herein is a franchise tax and as such it is allowed by section 1113(b) of the Federal Aviation Act. The defendants also contend that since the tax in question covers all earnings from every source that it does not constitute a gross receipts tax barred by the Federal Aviation Act.

That the tax challenged herein is based upon gross receipts is made clear by the affidavit of Paul B. Coburn submitted in opposition to the plaintiff's motion for summary judgment. Such affidavit demonstrates the operation of the tax in question with a hypothetical example of an aviation corporation. Such corporation is taxed on interest income, the sale of a plane, rental income, income from refueling services and ticket sales for passenger transportation. Gross earnings pursuant to subdivision 1 of section 184 of the Tax Law include all of the interest income, only the capital gains income from the sale of the plane, and all rental income. The amount received for refueling operations is reduced by the cost of the fuel. Income from ticket sales is taxed in full without reduction for the cost of providing the air transportation service. Thus section 184 of the Tax Law includes a tax on air carriers on the gross receipts from ticket sales for air transportation.

However, to apply section 1113 of the Federal Aviation Act to bar the tax in question would lead to inconsistent results and would make the statute irrational, or at least ambiguous. Subdivision b of section 1113 allows franchise taxes and sales taxes. This court cannot conceive of a sales tax which is not directly or indirectly a tax on the gross earnings from sales. Furthermore, such sales taxes can amount to substantial sums of money, for example, 7% at the Albany County Airport. This exceeds many of the taxes barred by section 1113.

Since the statutory language is inconsistent and ambiguous, the court must look to its legislative history to determine the legislative intent. Such history shows that the statute was enacted to bar discriminatory taxes levied solely against airlines in addition to normal franchise taxes and other taxes. Section 184 of the Tax Law levies a franchise tax on all transportation carriers based upon gross earnings. The plaintiff has failed to show that this tax, in effect since 1880, is in any way discriminatory. As such it is not barred by section 1113 of the Federal Aviation Act.

The motion for summary judgment in favor of the plaintiff is denied in all respects. Since it appears that section 184 of the Tax Law is constitutional, the defendants are granted summary judgment pursuant to rule 3212(b) of the CPLR.

Submit Judgment.

Dated: Troy, N. Y.
April 15, 1982.